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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5215

IN THE MATTER OF
ANGELA MARIE OTIS, et al.,
Alleged Neglected Dependent Children
(Pamela Otis Subler, Petitioner)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

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OCTOBER TERM, 1979

No. _____

IN THE MATTER OF
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Alleged Neglected Dependent Children
(Pamela Otis Subler, Petitioner)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner, Pamela Otis Subler, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Ohio, entered in this case on May 18, 1979.

OPINIONS BELOW

The judgment and opinion of the Court of Common Pleas, Juvenile Division, Van Wert County, Ohio is not reported. A copy is attached as Appendix A.

The journal entry of the Court of Appeals of the Third Appellate Judicial District of Ohio, Van Wert County is also not reported. A copy is attached as Appendix B.

The journal entry of the Supreme Court of Ohio is also not reported. A copy is attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 18, 1979. Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari were filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a dismissal of an appeal as of right caused by a denial of a free transcript and court appointed attorney for an indigent mother seeking to appeal an order permanently terminating parental custody violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1 ***[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case originated in January, 1977 in the Court of Common Pleas, Juvenile Division, Van Wert County, Ohio upon petition of the Van Wert County Welfare Department. On April 3, 1978 the Court found that the children of Ms. Pamela Otis Subler -- Angela Marie, age 3, and Terry James, age 6 months -- were neglected dependent children, and placed them in the permanent custody of the Van Wert County Welfare Department, with a recommendation of adoption (Journal Entry, App. A).

Ms. Subler, petitioner in this action, sought to pursue her appeal as of right granted by Ohio R.C. §2501.02(A). Because of her indigency, Ms. Subler filed a motion for a transcript at public expense on May 8, 1978 (App. D), and a motion for a court-appointed attorney on April 26, 1978. (App. E).

The Third District Court of Appeals, Van Wert County, Ohio, denied both motions in May 1978 asserting that it was without authority to authorize those expenses as expenses of appeal (App. G). Ms. Subler then obtained a stay of the proceedings and sought review of the denials in the Supreme Court of Ohio. However, on September 20, 1978 her memorandum in support of jurisdiction was dismissed sua sponte for lack of a substantial constitutional question (App. H).

Because Ms. Subler was without funds to purchase a stenographic transcript required by the Court of Appeals to certify the record, Ms. Subler's appeal was dismissed on November 24, 1978 for want of prosecution, based on her failure to file the record (App. B).

Ms. Subler sought review of this dismissal in the Supreme Court of Ohio. However on May 18, 1979 her memorandum in support of jurisdiction was dismissed for lack of a substantial constitutional question (App. C).

REASONS FOR GRANTING THE WRIT

1. THE QUESTION PRESENTED IN THIS PETITION RAISES IMPORTANT CONSTITUTIONAL ISSUES DECIDED BY THE SUPREME COURT OF THE STATE OF OHIO BUT NOT HERETOFORE DECIDED BY THIS COURT.

This Court has traditionally expressed a keen interest in the rights of parents and children in the juvenile justice system. See e.g. In re Gault, 387 U.S. 1 (1966); In re Winship, 397 U.S. 358 (1970); Stanley v. Illinois, 405 U.S. 645 (1972). More specifically this Court has recently been confronted with and decided cases involving the very same right (although not the same issues) involved in this petition, namely the parental right to care and custody of their children. Quilloin v. Walcoll, 434 U.S. 246 (1978); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) and Caban v. Mohammed ____ U.S. ____ 99 S. Ct. 1760 (1979). This case presents the Court with an opportunity to decide heretofore unanswered questions of constitutional magnitude which are of the utmost importance because of their impact on the underlying fundamental right to parental care and custody and their pervasiveness throughout the juvenile justice system.

Although the rights secured by previous decisions of this Court, See e.g. In re Gault, supra; In re Winship, supra; Stanley v. Illinois, supra; Caban v. Mohammed, supra, are of the utmost importance, that importance is greatly diminished if those rights cannot be protected from infringement by

the trial court through the appellate process. In the case at bar, or in most juvenile or family court cases throughout the country, all legal and factual determinations were made by one judge, since there was no right to a jury trial. Ohio Revised Code § 2151.35; McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Without meaningful appellate review, which is effectively denied an indigent when a free transcript and court appointed attorney are denied, all of the rights secured by the Constitution may go for naught since any violations of those rights by the trial judge would go undetected and uncorrected.

The issues raised by this petition are pervasive in the juvenile justice system, as evidenced by the frequency with which these issues are litigated in the state courts. See infra, p. 8. Furthermore, indigents, precisely because of their indigency, are more likely to have contact with welfare and children's services agencies and consequently represent a disproportionate number of cases in juvenile or family court, where the mere fact of their poverty may further work to their detriment. "Studies . . . suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child . . . This accounts, it has been said, for the hostility of agencies to the efforts of natural parents to obtain the return of their children." Smith v. Organization of Foster Families, supra, 431 U.S. at 834-835. Consequently, the issues raised in this petition are of great importance to large numbers of persons in the juvenile justice system because the very group of people who more frequently appear in juvenile court and who are more likely to suffer from the b ases of their accusers are the most likely to need to invoke the appellate process in order to correct trial court errors.

Because this Court has never decided the important constitutional question presented by this Petition, a question that has a critical impact on other constitutionally protected rights and pervades the juvenile justice system, the writ must be granted.

2. THE QUESTION PRESENTED BY THIS PETITION HAS BEEN DECIDED BY THE SUPREME COURT OF THE STATE OF OHIO IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Although this Court has not yet decided the question presented by this Petition, applicable decisions of this Court indicate that the Due Process and Equal Protection provisions of the Fourteenth Amendment were violated by the denial of petitioner's request for a free transcript and a court appointed attorney. In fact, virtually every court, except those in Ohio, which has decided the question is in accord with that proposition.

Although a state need not provide an appeal at all, McKane v. Durston, 153 U.S. 684, 687-688 (1894), this Court has made it clear that if a state does provide for appellate review, it cannot do so in a way that discriminates against some because of their poverty. Douglas v. California, 372 U.S. 353, 355 (1963) "Consequently, at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons . . . from invidious discrimination." Griffin v. Illinois, 351 U.S. 12, 18 (1956).

Even though Griffin specifically involved the appeal of a criminal felony conviction, the rationale of that decision has not been limited to appeals from felony convictions nor even to appeals of criminal cases. In Mayer v. Chicago, 404 U.S. 189 (1971) a unanimous Court held that the principle in Griffin extended to city ordinance violations punishable by fine only and specifically held that the distinction between felony and non-felony cases was "' an unreasoned distinction' proscribed by the Fourteenth Amendment." 404 U.S. at 196 (citation omitted). Further, in Long v. District Court of Iowa, 385 U.S. 192 (1966) this Court extended the provision

of transcripts to the civil area when it held that a state must furnish an indigent petitioner with a copy of a transcript of his habeas corpus proceeding for use on appeal.

In addition to the right to a transcript, due process and equal protection guarantee that in an appeal as of right an indigent is entitled to a court-appointed attorney. Douglas v. California, 372 U.S. 353 (1963). In that case, the Court noted that the denial of counsel to an indigent on an appeal as of right "would seem to be a discrimination at least as invidious as that condemned in Griffin v. Illinois." 372 U.S. at 355 (citation omitted). The Court went on to hold that:

> [W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor 372 U.S. at 357 (emphasis in original).

It is important to note that the appellants in Douglas had been supplied with a transcript, and yet the Court recognized that the skills of an attorney were still necessary to aid them in framing an appeal so as to be presentable to a court.

Surely, the interest of petitioner in the continued care and custody of her children is at least as great as the interest protected in the above-mentioned cited cases, for this Court has held that a parent's right to the care, custody, companionship and management of him or her is a fundamental aspect of personal liberty entitled to the fullest measure of due process and equal protection. As stated by this Court in Stanley v. Illinois, 405 U.S. 645, 651 (1972):

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection: It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurt, J., concurring).

The rights to conceive and to raise one's children have been

deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953)." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligation the state can neither supply nor hinder." Prinel v. Massachusetts, 321 U.S. 158, 166 (1944).

Virtually every state and lower federal court, except, of course, in Ohio, that has decided the issues raised by this petition has decided, based at least in part, on the above applicable decisions of this Court, that an indigent parent desiring to appeal a parental rights termination must be provided with a free transcript and court appointed attorney. As stated by the Michigan Supreme Court, after a detailed analysis of the constitutional precedents concerning these issues:

> [I]ndigent parents are entitled to meaningful and adequate access to the appellate process . . . this right can only be achieved through the representation by counsel and providing counsel with necessary transcripts. The Equal Protection Clause requires that indigent parents be provided counsel for prosecuting the first appeal as of right to the circuit court and such transcripts as counsel requires. Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 65 (1976).

The court specifically held that parental rights at stake in the parent-child relationship are constitutionally protected and encompassed within the meaning of the term "liberty" as used in the Due Process Clause. Likewise, the Supreme Court of Arizona in In the Matter of the Appeal in Pima County, Juvenile Action No. 2-46735 v. Howard, 112 Ariz. 170, 540 P.2d 642, 643 (1975) has stated that "because the right to raise one's children is fundamental, any proceeding by the state to deprive a person of that right must take place under the aegis of the equal protection and due process clauses of the Fourteenth Amendment." The court thus held that the Court of Appeals could not deny the parent's statutory right

to appeal solely because of her indigency by requiring her to pay a filing fee and transcript preparation costs. Other cases reaching similar conclusions are: Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me. 1973); State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W.Va. 1974); In re Adoption of I, 455 Penn 29, 312 A.2d 601 (1973); In re Ella B, 30 N.Y. 2d 352, 285 N.E.2d 288 (1972); In re Welfare of Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); Chambers v. District Court of Dubuque County, 261 Iowa 31, 152 N.W.2d 818 (1967); In re Karren, 280 Minn. 377, 159 N.W.2d 402 (1968); Nix v. Department of Human Resources, 236 Ga. 794, 225 S.E.2d 306 (1976); In re Ward, 351 So.2d 571 (Ala. 1977); Crespo v. Superior Court for County of Los Angeles, 41 Cal. App. 3d 115, 115 Cal. Rptr. 681 (1972).

Thus, it appears that the Supreme Court of the State of Ohio has decided the question presented by this petition in a manner probably not in accord with applicable decisions of this Court. Therefore, the Writ must be granted to review and correct this error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Supreme Court of Ohio.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS, JUVENILE DIVISION
VAN WERT COUNTY, OHIO

In the Matter of :	April 3, 1978
Angela Marie Otis et al :	No. 3994
alleged neglected/dependent:	JUDGMENT ENTRY
child :	

This cause came on for hearing on March 30, 1977 and has been continued from time to time for further hearing, the final session being March 1, 1978.

Upon due consideration, the Court finds all writs have been duly served and that all necessary and proper parties are presently before the Court and represented by counsel.

Having heard the evidence, and upon due consideration, the Court finds said children to be dependent and neglected as in the complaint alleged in that:

The father of Angela Marie Otis, Bobby Otis, has not shown any real interest in the welfare of his child and has contributed no substantial amount toward her support at any time; that he was unable to indicate he had a suitable home in which to provide for her, and that at present his whereabouts are unknown to this Court;

The father of Terry James Otis, John Anderson, has never contibuted toward the support of his child, has never maintained any kind of steady employment, has never attempted to establish a suitable home for his child and is presently unable, by reason of his own faults and habits, and unwilling, by his own testimony, to assume custody of his child.

The mother of said children, Pamela Otis, has neglected them by failing to provide suitable and necessary clothing, food, shelter and medical attention, thus allowing them to become physically weakened and in delicate health; that she has not met minimal standards in sanitation and hygiene in

failing to provide for their care in a suitable environment; that she has pursued her own pleasures to the detriment of her children's health and welfare; that, although given more than a year to change her habits, she has not shown sufficient interest in her children to do so; that she still has no suitable home in which to care for them; that her visitation has been no more than sporatic; and that she presents nothing of a suitable and acceptable plan for the present welfare of the children, or their future.

It is therefore ordered that said children be, and they are removed permanently from the custody of their parents, and committed to the permanent care, custody and control of the Van Wert County Department of Welfare for adoption or otherwise as they shall deem in said children's best interests.

It is further recommended that said children be placed with James and Freida Dray of Delphos, Ohio for adoption for the following reasons: They have had the children in their care for more than a year and are the only real parents known to them; that they are distant relatives of the children, and have indicated their desire, after being fully advised as to all the problems that could arise, to adopt them as their own.

Cathryn L. Harrington

Cathryn L. Harrington, Judge

Copy: Pamela Otis, John Lee Anderson, Atty. Kevin Taylor, Atty. Stephen Keister, Atty. Rex Fortney, Atty. William Wildenhaus, Atty. Sumner E. Walters, Welfare Department, Juvenile Departmen

APPENDIX B

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

VAN WERT COUNTY

CLK. VAN WERT CO. OHIO

IN THE MATTER OF ANGELA MARIE OTIS, ET AL., ALLEGED NEGLECTED DEPENDENT CHILDREN,	:	CASE NO. 15-78-3
(PAMELA OTIS, APPELLANT)	:	J O U R N A L E N T R Y

This cause came on for determination sua sponte as to whether the appeal should be dismissed for want of prosecution.

Upon consideration the Court find that on June 13, 1978 it stayed proceedings pending the appeal to the Supreme Court of the issue of court appointed counsel and of the supplying of transcript at public expense; that appeal was taken to the Supreme Court in case number 78-695 in that court and on September 20, 1978 the motion to certify the record was overruled; that since that date the appellant has taken no further action to prosecute the appeal in this court; and that the appeal should, therefore, be dismissed for want of prosecution.

It is therefore ORDERED, ADJUDGED and DECREED that the appeal be, and the same hereby is, dismissed at the costs of the appellant and that the cause be, and the same hereby is, remanded to the Juvenile Division, Court of Common Pleas of Van Wert County, for execution.

Exceptions saved.

JUDGES

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Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1979

No. 79-5215

IN THE MATTER OF
ANGELA MARIE OTIS, et al.,
Alleged Neglected Dependent Children

RESPONDENT'S BRIEF FOR DENYING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

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IN THE MATTER OF
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Alleged Neglected Dependent Children

RESPONDENT'S BRIEF FOR DENYING
A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF OHIO

REASON FOR DENYING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF OHIO WAS BASED ON STATUTORY INTERPRETATION OF THE OHIO REVISED CODE.

The petitioner's argue that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Consitution were violated by the denial of petitioner's request for a free transcript and court appointed attorney. Although these issues were raised on the appellate level the Supreme Court of Ohio had adequate state ground to determine this issue.

Section 2151.352 of the Ohio Revised Code states:

> "A child, his parents, custodian or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120 of the Revised Code." (for full text of statute, see A-1).

The Supreme Court of Ohio on September 20, 1978 and May 18, 1979 dismissed petitioner's appeals for lack of a substantial constitutional question. Neither dismissal was accompanied by a written opinion. However, it can be presumed that Court was fully aware of the Ohio Statute as well as petitioner's claim.

It is a well-established principle that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. See U.S. ex rel. Herge v. Com. of Pa. D.C. Pa1950, 89 F. Supp 636.

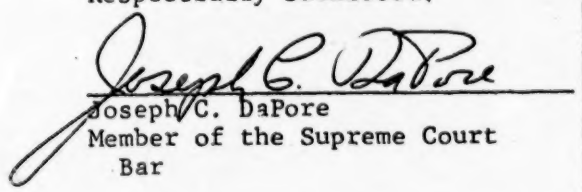
In addition to the requirement that the federal question was necessary for the determination of the case, where the state decision might have been either state or federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not review the decision. U.S. ex rel Herge v. Com. of Pa. D.C. Pa 1950, 89 F. Supp 636.

If the Court would grant the Writ, it would necessarily involve the interpretation of the Ohio statute which should properly be left to the Supreme Court of Ohio.

CONCLUSION

For the reasons stated above, a writ of certiorari should be denied.

Respectfully submitted,



Joseph C. DaPore
Member of the Supreme Court Bar

APPENDIX A

Section 2151.352 Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing

such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon written request prior to any hearing involving such child.

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Supreme Court, U.S.
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REPLY BRIEF OF PETITIONER

This reply brief, filed pursuant to Sup. Ct. R. 24(4), addresses the argument first raised in respondent's brief in opposition that the decision of the Supreme Court of Ohio was based on statutory interpretation of the Ohio Revised Code.

Preliminary Statement

In her petition for certiorari, docketed on August 16, 1979, petitioner Otis sought review of the judgment and order of the Supreme Court of Ohio, entered on May 18, 1979, dismissing her appeal for lack of a substantial constitutional question.

Petitioner presented the question whether a dismissal of an appeal as of right caused by the denial of a free transcript and court appointed attorney for an indigent mother seeking to appeal an order permanently terminating parental custody violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

Petitioner relied on two reasons for granting the writ. First, the question presented raises important constitutional issues decided by the Supreme Court of Ohio but not heretofore decided

by this Court. Second, the question presented has been decided by the Supreme Court of Ohio in a way probably not in accord with applicable decisions of this Court. See Long v. District Court of Iowa, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963).

In the brief in opposition, the only argument respondent asserts is one not addressed in the petition for certiorari. Respondent suggests that the decision of the Supreme Court of Ohio was based on statutory interpretation of the Ohio Revised Code. Petitioner submits that there was no adequate and independent state ground upon which the Supreme Court of Ohio could base its dismissal and that a decision of the federal constitutional question was necessary to its determination.

For these reasons and the reasons stated in the petition for certiorari, petitioner respectfully prays that the Court issue a writ of certiorari.

ARGUMENT

A DECISION OF THE FEDERAL CONSTITUTIONAL QUESTION WAS NECESSARY TO THE DETERMINATION OF THE SUPREME COURT OF OHIO

Importantly, Respondent does not contest that the question presented in the Petition raises important constitutional issues decided by the Supreme Court of Ohio, but not heretofore decided by this Court, nor that the question presented has been decided by the Supreme Court of Ohio in a way probably not in accord with applicable decisions of this Court. Furthermore, Respondent does not contest the issue of a free transcript. Instead, Respondent asserts that the petition should be denied because the decision of the Supreme Court of Ohio was allegedly based on statutory interpretation of the Ohio Revised Code and therefore rested on adequate state grounds.

As support for this argument, Respondent asserts two "well-established" principles. One is that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. The second is that where the state decision might have been either on a state or federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not review the decision.

Respondent has admitted that the federal constitutional question -- whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment were violated by the denial of Petitioner's request for a free transcript and court appointed counsel -- was raised on the appellate level and presented to the Ohio Supreme Court. (Respondent's brief p.1) Thus, Respondent places total reliance on its assertion that the adequate and independent state ground principles are applicable to this case. Respondent's assertion is, however, an empty one.

First, the Supreme Court of Ohio, issuing no opinion, dismissed petitioner's memorandum in support of jurisdiction for lack of a substantial constitutional question. That finding, in light of the federal constitutional questions concededly raised, is an adjudication that the federal constitutional questions were without merit. That finding had to arise from the state court's evaluation of the questions presented. Stating that a "substantial" constitutional question does not exist implicitly involves review of the questions asserted. By explaining its dismissal in this way, the state court has explicitly rendered a decision based upon federal constitutional questions.

Second, the state statute cited by Respondent does not deal with the issue of a free transcript for an indigent seeking appeal as of right, but merely addresses the issue of court appointed counsel. Therefore, the only ground for denial of a free transcript would have necessarily involved a determination that such a denial did not violate the Fourteenth Amendment -- a federal constitutional question.

Third, the federal question was also necessary to the court's determination of the issue of court appointed counsel. The mere presence of a nonfederal ground is not the equivalent of the presence of an independent and substantial state ground. Thus, although the state decision may have involved the interpretation of a state statute, this does not necessarily create an adequate state ground. A state ground may become so interwoven with the federal ground as not to be an independent matter; consequently, this Court has jurisdiction to review the decision. Abie State Bank v. Bryan, 282 U.S. 765 (1931). Furthermore, even though the claimed constitutional protection be denied on nonfederal grounds, this Court may inquire whether the state court's decision rests upon a substantial basis. If "the purported nonfederal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory," the appellant may invoke the jurisdiction of this Court. Lawrence v. Mississippi Tax Comm'r, 286 U.S. 276, 282-83 (1932).

Fourth, regardless of how the Ohio Supreme Court may have interpreted the Ohio Revised Code, its interpretation would not provide an independent and adequate state ground. If the court decided the statute precluded court appointed counsel for an appeal as of right, then the statute itself is unconstitutional in that it violates the Fourteenth Amendment. If the court decided that the statute merely did not authorize the appointment of counsel, then the federal constitutional questions still remain: the state statutory ground would not have resolved the federal issue. Therefore, neither interpretation of the statute provides an independent and adequate state ground, and this Court has jurisdiction to decide the federal constitutional questions.

The rationale of the principle of adequate and independent state ground has been described by this court:

> [The purpose] is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Accord, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

In the case at issue, a determination that a denial of a free transcript and court appointed counsel violated the Fourteenth Amendment would not simply revise the state court's opinion; it would correct a wrong judgment on federal constitutional law. The rationale of the principles relied on would not, therefore, apply here.

In the case at issue, the federal question was not immaterial. In upholding the denial of a free transcript and court appointed counsel, the Ohio Supreme Court could not have ignored the issue of the constitutionality of such denial. Thus, the federal constitutional question was presented to the Ohio Supreme Court, and the federal constitutional question was necessary to its determination of the cause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Supreme Court of Ohio.

Respectfully submitted,

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